APPENDIX

APPENDIX A.

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 18610

BERTHA DUTY, - - - - - *Plaintiff-Appellee.*

v.

GEORGE W. DOTSON, - - - *Defendant-Appellant.*

APPEAL from the United States District Court
for the Eastern District of Kentucky.

OPINION—Decided February 14, 1969;
Filed February 14, 1969.

Before: PHILLIPS, EDWARDS and MCCREE, Circuit Judges.

PER CURIAM. Mrs. Bertha Duty, appellee herein, was injured when a log fell on a car in which she was a passenger as it drove along a Kentucky highway. The log had been cut on a steep hillside by two employees of the Dotson Coal Company, a sole proprietorship.

This action was brought against George Walker Dotson on the theory that he owned the coal company, was the employer of the two men who cut the log and was liable under the doctrine of respondeat superior. Dotson denied that he owned the coal company and claimed that it was owned by his son, Don, a college student. He further asserted that the two men were in deviation from their instructions at the time they cut the log and that he could

not be liable for their acts even if he had been owner of the mine.

The first trial in October 1964 resulted in a jury verdict for Mrs. Duty, but the District Court granted a new trial on all issues. A second trial in February 1966 again resulted in a jury verdict for Mrs. Duty, but the Court granted a new trial limited to the issue of damages. The present appeal is from judgment based upon a jury verdict of $38,519.64 at the third trial.

The son, Don Dotson, who appellant contends was the owner of the mine and employer of the two workmen, did not testify at any of the three trials. The record shows that the father made arrangements for the employment of the two workmen, gave them instructions as to the work they should do, and agreed to pay their wages in groceries and supplies from a store operated by him. From this evidence the jury could have concluded that the father and not the son was the employer of the workmen. We find evidence in the record from which the jury could have concluded that the workmen were not in substantial deviation from their instructions and were not acting outside the scope of their employment at the time they cut the log that fell upon and injured Mrs. Duty.

The most serious question presented on the appeal is whether the District Judge committed reversible error at the beginning of the second trial in refusing to sustain defendant's challenge for cause against the seating of two prospective jurors who at that time were plaintiffs in pending lawsuits. The action of the District Judge in rejecting these challenges for cause under some circumstances could have constituted reversible error and we think it would have been better practice in this case for these two challenges for cause to have been sustained. Under the facts of the present case, however, we find no prejudice to defendant resulting from the rejection of the challenges and therefore decline to reverse on this ground. Defendant

exercised his peremptory challenges of the two prospective jurors in question and they did not serve on the jury. There is no showing that defendant's use of these two peremptory challenges in this manner exhausted his supply of peremptory challenges to the extent that he was deprived of a fair trial by an impartial jury. Reporting of the voir dire examination was waived by agreement of the parties, and we have no evidence before us to overturn the presumption of regularity of these proceedings before the District Judge. We find nothing of record to establish that the ruling of the District Judge on these challenges for cause under the facts and circumstances of this case was so manifestly erroneous and prejudicial as to require reversal.

All other contentions made by appellant have been considered and found to be without merit.

Affirmed.

APPENDIX B.

CERTAIN MOTIONS AND RULINGS OF THE COURT IN THE SECOND TRIAL.

Judge Auxier: In considering the selection of a Jury we find that we have two members of the panel who at this time have claims pending from automobile accidents and, of course, we found out their reactions, but after conferring about it, we believe that probably we should raise the question. It's sort of against human nature.

The Court: You don't know whether they have a plaintiff's claim or a defendant's.

Judge Auxier: We went into it and one of them had a defendant's claim that was settled two years ago, but two others have plaintiffs' claims which are now pending.

The Court: Well, I learned a long time ago that a juror is going to try a case on the merits. I don't think the fact that there is a claim pending would prejudice anybody. I know one of these jurors had a wreck on his way to court. They called in. What do you have to say about it, Mr. Page?

Mr. Page: Those jurors were asked if it would influence them in any way. I can only proceed on the basis of what they say.

The Court: Let the objection be overruled.

APPENDIX C.

TRANSCRIPT OF TESTIMONY OF BERTHA DUTY (SECOND TRIAL)—Filed August 12, 1966.

Q. 120. Mrs. Duty, you testified that you were working for a box company before this accident. Have you worked any since the accident?

A. I tried to work. I worked three weeks and I had to quit because I couldn't use my right arm as I should.

Q. 121. When did you work three weeks?

A. July of '64.

Q. 122. And you tried on that occasion to do the work you had been doing before the accident?

A. No, it's not the same kind of work.

Q. 123. Well, was it about the same?

A. No, it wasn't about the same. It was just putting leaves of paper together and putting little wires in the back of them, and I couldn't use my hand at any speed at all to keep up with the other girls.

Q. 124. Well, would you say this work that you did during this three weeks was easier or was it harder than the work you did before?

A. Well, it was easier work, but I couldn't keep up with the other girls.

Q. 125. Except for the three weeks that you mentioned that you worked in June or July of 1964, have you worked any since the accident in June of '61?

A. No.

Q. 126. Mrs. Duty, since this accident to what extent have you been able to perform the household duties that you performed before?

A. I'm able to make the beds, dust, sweep and press the children's clothes and do the cooking. That's all I'm able enough to do.

* * * * * * *

Q. 58. Have you been in any hospital since as a result of this accident?

A. No, sir.

Q. 59. You said a moment ago that you undertook to work again some time in 1964. Do you remember about when that was in 1964?

A. In July of '64.

Q. 60. You said you worked, I believe, about three weeks. Is that right?

A. Yes, sir.

Q. 61. Now, did you go back to your same employer?

A. No, sir.

Q. 62. What employer did you have when you went back to work in '64? Who was the—

A. I worked for Dobson and Evans Book Company.

Q. 63. Is that Dobson, D-o-b-s-o-n?

A. Yes, sir.

* * * * * * *

Q. 110. Now when after your injury did you decide to see if you could work again? When did you feel like trying to work again?

A. Well, I just had to prove to myself to see. Once you ever work, you don't want to give up all your life by setting at the house.

Q. 111. Well, now you told us that you went back to work in July of 1964. Had you gone back to work before that any time anywhere?

A. No, sir, I couldn't.

Q. 112. You weren't able to any time before?

A. No.

Q. 113. How long did you look for this job in July of '64 before you found it?

A. Well, I just went out with one of my girl friends one day. She wanted me to go with her and I found this little job and I thought I could do it.

Q. 114. Do you mean—did you go to the place where one of your girl friends was working? Is that what you mean?

A. No, she went there and I went with her. She took me.

Q. 115. She took you to a place where she was looking for work?

A. Yes.

Q. 116. And did she get a job, too?

A. No, sir.

Q. 117. But you got one?

A. Yes, sir.

Q. 118. How long before that was it that you had decided that you wanted to try to work again?

A. I've always wanted to try to work since I've been sick.

Q. 119. When did you feel like you could work? You felt that you could do the work when you got this job, didn't you?

A. I was making myself feel like I could do it.

Q. 120. Well, now what we want to know is whether at that time you felt like you were strong enough and able to do the work, or whether you felt like you couldn't do the work. What was your opinion at the time you got this job in 1964?

A. I felt that I should try.

Q. 121. You felt like it was your duty to try and see if you could?

A. See if I could do the work, do any kind of work in a factory.

Q. 122. Had you tried any time before this to get a job?

A. No, sir.

Q. 123. Well, why didn't you? Didn't you feel like you could—

A. No, I didn't even feel like trying.

Q. 124. Then in July of '64 you had reached the point where you felt like trying to get a job?

A. Yes, to see if I could do it.

Q. 125. Now when you got the job, did you honestly do your best to try to hold the job and do the work?

A. Yes, I honestly done my best.

* * * * * * * *

Q. 132. Did they tell you that you couldn't reach the speed that they had to have on that job?

A. Yes, sir, the boss told me the day before.

Q. 133. Well, did you just quit, or did they tell you that your services would be dispensed with?

A. They told me my services would be—I would be fired.

Q. 134. That you wouldn't have a job any longer?

A. Yes.

Q. 135. Now in looking for other employment, have you tried to get another job since that?

A. No, sir.

Q. 136. In July of '64?

A. No, sir.

Q. 137. Do you still feel that you couldn't do a job that required any physical exertion?

A. Yes, I do feel that I couldn't do it. I couldn't do any kind of heavy work now, or any type of work that would tire me out, any bending, stooping or lifting.

Q. 138. Then I take it you couldn't do the kind of lifting that you did when you worked for this box company, lifting 35-pound and 25-pound bundles?

A. No, sir.

Q. 139. Now before 1964 and after this accident did you try to get any employment? You said a moment ago, I believe, that you didn't feel like trying. What I want to know is, did you actually try anywhere to get a job?

A. Well, I tried at Dobson and Evans and they gave me the job, and then after that I lost my job there because I couldn't do the work. I never did try since.

Q. 140. Now what I am asking you about, Mrs. Duty, that was in July of 1964?

A. Yes, sir.

Q. 141. Now what I mean is before that, between the time this accident happened in 1961 and July of 1964, did you actually make any effort anywhere to get any job?

A. No, sir.

Q. 142. Was there any reason why you didn't try before 1964, before July?

A. Yes, because I lived in pains and aches. I wasn't able to try.

* * * * * * *

Q. 166. Mrs. Duty, if I understand your testimony, you feel that you were disabled as a cause of this accident and that your disability to do the kind of work you had been doing has continued right up to the present. Is that what—

A. Sir?

Q. 167. Is that what you feel? From your own knowledge of what you can do and what you can't do, are you telling us that you feel you were disabled as a result of this accident and that that disability has continued up to the present, I take it? Is that what you mean?

A. Yes, sir.

Q. 168. And you did your best in 1964 to carry on a lighter industrial job than you had with the box company and you feel sincerely that you were unable to do that work?

A. Yes, sir.

Q. 169. Now, Mrs. Duty, in September of 1962 did you receive two checks for $35.00 each, paid to you as an employee of the Blue Box Company because the Blue Box Company was not putting you to work when you were ready, able and willing to go to work?

A. No, sir.

Q. 170. You did not? In August of 1963 did you receive three checks of $35.00 each, paid to you as unemployment compensation from the unemployment fund of Blue Box Company because you had applied to the Blue Box Company for employment after this accident and they had failed to employ you?

A. Yes, sir.

Q. 171. You did?

A. Yes.

Q. 172. Now let's go back and talk about the September checks. Did you get those checks in September, unemployment?

A. I got the checks in September. I got checks in '63.

Q. 173. How's that?

A. '62 of unemployment.

Q. 174. You drew unemployment in '62?

A. Yes.

Q. 175. Now from whom did you draw that unemployment?

A. From the Blue Box Company.

Q. 176. And how did you get that unemployment compensation?

A. Because I was able just to do things that I felt I could do, light work setting down, and I couldn't find it.

Q. 177. Now let me ask you this. Did you go back to your employer, the Blue Box Company, in 1962 and tell them that you were ready, able and willing to go to work for them?

A. At light work, something that I could set down

to do.

Q. 178. Well, you went back and applied. Did you tell them you were able now to go to work?

A. Now?

Q. 179. At that time in 1962.

A. That I could set down and do light work, if they could furnish me light work.

Q. 180. Well, did you go and tell them that you were able and willing to do—

A. Light work.

Q. 181. Light work. Did your doctor tell you—did he give any—who was your doctor then?

A. Dr. Hughes.

Q. 182. Is that the doctor who testified in your behalf in this case?

A. The doctor up at the University.

Q. 183. Did Dr. Hughes, who you said was your doctor then, testify in this case for you? Is he the same Dr. Hughes?

A. The same doctor.

Q. 184. Now did he say that you were able to go to work at that time?

A. He said he would leave that up to me.

Q. 185. How's that?

A. I asked him and he said "Bertha," he said "That's up to you, if you felt you can try it, it's up to you, you know your feelings; but I will say you could set down and do light work, but not standing or lifting or bending."

Q. 186. Did you tell your former employer, the Blue Box Company, that you were ready to go to work?

A. At light work.

Q. 187. At light work or any other kind of work. And did they furnish you light work or any other kind of work?

A. No, sir.

Q. 188. Then what did you do?

A. I signed up on my unemployment.

Q. 189. And where did you do that?

A. State employment office.

Q. 190. Where was that?

A. Cleveland Avenue in Columbus, Ohio.

Q. 191. In Columbus?

A. Yes, sir.

Q. 192. Did you sign a statement that you were ready, able and willing to go to work?

A. At light work, at something—

Q. 193. And that your employer had refused?

A. Yes, sir.

Q. 194. Now, then, how long did you draw that unemployment compensation?

A. Six months.

APPENDIX D.

MOTION FOR JUDGMENT n.o.v. OR ALTERNATIVELY FOR A NEW TRIAL—Filed March 7, 1966.

Comes now the defendant and moves the Court to set aside the verdict of the jury had in this action of February 24, 1966, and the judgment entered thereon, February 26, 1966, and to enter a judgment for defendant in accord with defendant's motion for directed verdict at the conclusion of plaintiff's evidence and in accord with defendant's motion for directed verdict at the conclusion of all the evidence; and in the alternative defendant moves the Court to set aside the verdict and judgment aforesaid and grant to defendant a new trial, and for cause defendant assigns:

1.

There was no evidence of any negligence on the part of defendant, or any other person, which was, or could be, the cause of the injuries complained of.

2.

The verdict is contrary to law.

3.

The verdict is contrary to the evidence.

4.

There was a complete failure of proof as to plaintiff's disabilities and losses.

5.

The Court erred in declining to permit defendant to challenge for cause the juror, Lacy Patrick, and the juror, Paul Bickford, each of whom admitted on voir dire that he was then, at the time he was drawn in this case, prosecuting a claim for damages in a motor vehicle accident.

6.

The Court erred in refusing to let Dr. F. J. Burian, offered as a witness by the defendant, testify from X-rays

of the plaintiff taken and identified by the systematic means provided for the purpose in the Williamson Memorial Hospital, Williamson, West Virginia.

7

The Court erred in refusing to permit the witness Clyde E. Baird to testify to his knowledge that Don H. Dotson initiated the Dotson Coal Company in March of 1961, carried on the operation as his venture and reported the same for Income Tax purposes as his venture.

8.

The Court erred in refusing to permit the witness, G. W. Whitt, to be cross-examined about the identity of his employer shown by his pay checks and income tax forms filed by him.

9.

The Court erred in refusing to permit the witness, Anthony Coleman, to be cross-examined about the identity of his employer shown by his pay checks and income tax forms filed by him.

10.

The Court erred in refusing to permit the defendant to testify to the name of Don H. Dotson appearing on pay checks endorsed and cashed by the witnesses G. W. Whitt and Anthony Coleman after each of them had testified that he had no knowledge that at any time Don H. Dotson had any connection with Dotson Coal Company.

11.

The Court erred in refusing to permit the defendant to read the deposition of Dr. C. J. Greever of Jackson, Ohio, taken on February 18, 1966.

12.

The Court erred in declining to give Instruction No. 2, offered by the defendant, which presented his defense of deviation and departure from the scope of employment.

13.

The Court erred in giving, over the objection of the defendant, instructions which did not present the defense of deviation and departure.

14.

The plaintiff testified that she had been continuously disabled from performing work of any sort from the time of her injury on June 26, 1961, to the date of this trial, February 21, 1966.

She testified that she had not undertaken to obtain work until July of 1964, when she took a job with the Dobson-Evans Company and found after three weeks she was unable to work.

She testified that she had not obtained unemployment compensation from her former employee, The Blue Box Company of Columbus, Ohio, by representing that she was ready, willing and able to work.

Thereafter on further cross-examination she admitted that she had gone back to her employer in 1962, asserted that she was able to work and when she was not employed she applied for and received unemployment compensation; that she had made the repeated representations of availability and ability to work so that she was paid the maximum permitted by law, six months in 1962.

Since she could not have been simultaneously ready, willing and able to work and totally disabled from work, the most favorable view to her the Court could have would be that her contradictory statements cancel each other and there was a total failure of proof on her part.

15.

The plaintiff testified that her physician at the time she presented herself for work at The Blue Box Company was Dr. Hughes, who testified by deposition in her behalf. It was his testimony that plaintiff was totally disabled from June 26, 1961 to January 5, 1966, and was totally and permanently disabled to the extent of 75% thereafter.

The plaintiff admitted on cross-examination that she discussed returning to work with this same physician early in 1962, and he told her it was alright for her to go back to work, if she felt like it. She thereupon made application with The Blue Box Company to go back to work and when refused prosecuted and maintained her claim for unemployment compensation throughout six months of 1962. Since the plaintiff's medical witness could not have believed the plaintiff to be totally disabled from work and simultaneously believed that it was proper for her to go back to work, if she felt like it; and since the Doctor's statement is reported by the plaintiff herself, who is relying solely on his medical testimony the finding most favorable to plaintiff is that there was a complete failure of medical testimony in her behalf.

For these reasons the Court erred in overruling the defendant's motion for a directed verdict in his favor at the conclusion of the plaintiff's evidence and in overruling defendant's motion for a directed verdict in his favor at the conclusion of all the evidence.

16.

For the reasons assigned in Paragraph 14 and Paragraph 15, the Court erred in permitting the plaintiff to file an amended complaint over the objection of defendant after all the evidence was in, which amendment permitted plaintiff to recover damages not due or receivable under her own evidence.

And on these alternative motions defendant prays the judgment of the Court.

Jean L. Auxier,
Pikeville, Kentucky,
Attorney for Defendant.

APPENDIX E.

MOTION FOR NEW TRIAL ON THE GROUND OF NEWLY DISCOVERED EVIDENCE AND ON THE GROUND OF MISREPRESENTATION AND MISCONDUCT OF PLAINTIFF—Filed June 24, 1966.

Comes now the defendant, George W. Dotson, without waiving his motion for judgment n.o.v. and without waiving his motion for new trial, heretofore pending, and moves the Court, under Rule 60B (2)-(3), for an order setting aside the verdict of the jury received in this action on February 24, 1966, and the judgment entered on February 26, 1966, and granting to this defendant a new trial, and for cause defendant assigns:

1.

Plaintiff was employed by Forrest Towel Supply Company of 3540 East Fifth Avenue, Columbus, Ohio, from September 1964 to March 1965.

2.

Plaintiff was employed by Art Lithograph & Printing Company of 378 East Main Street, Columbus, Ohio, from May to July, 1965.

3.

Plaintiff, during 1965, drew Unemployment Benefits under the Ohio Bureau of Unemployment based on her employment by one, or both of these employers, representing repeatedly for the purpose of such drawing that she was able to work and was seeking employment.

4.

Plaintiff testified that she did not have such employment; that she did not draw such Unemployment Benefits; that she was totally disabled from performing the duties of any employment during these periods.

5.

Defendant did not know plaintiff's testimony, in this respect, was false until about the beginning of the present session of the Pikeville term of Court.

And on this motion defendant prays the judgment of the Court.

Jean L. Auxier,
Pikeville, Kentucky,
Attorney for Defendant.

APPENDIX F.

AFFIDAVIT OF DEFENDANT, GEORGE W. DOTSON, IN SUPPORT OF MOTION FOR NEW TRIAL—Filed June 24, 1966.

State of Kentucky }
County of Pike }

George W. Dotson, defendant herein, being first duly sworn deposes and says; that upon the trial of this action plaintiff, Bertha Duty, testified that she was totally disabled from performing the duties of any employment from June 26, 1961 to February 21, 1966, the date of her testimony; that during that period she had held no employment, except a period of about three weeks in 1964, when she undertook to hold a job with Dobson & Evans of 1100 West Third Avenue, Columbus, Ohio.

The plaintiff testified that she had no other employment and had worked for no other employer during that period. The plaintiff, likewise, testified that she had made no claim for Unemployment Insurance Benefits and had not represented that she was able to hold employment during that period.

Affiant states that plaintiff was actually employed by Forrest Towel Supply Company of 3540 East Fifth Avenue, Columbus, Ohio, from September 1964 to March 1965. Plaintiff was employed by Art Lithograph & Printing Company of 378 East Main Street, Columbus, Ohio, from May to July, 1965.

Plaintiff actually represented, after the above employment, that she was able to work and seeking employment and as a result drew Unemployment Benefits based upon her earnings in one, or both of these jobs.

Affiant did not know the testimony of plaintiff, regarding employment and regarding her collection of Unemployment Benefits, was false until the beginning of this June 1966 term of this Court.

Further Affiant sayeth not.

George W. Dotson.

Subscribed and sworn to before me by George W. Dotson this June 23, 1966.

My Commission expires April 27, 1970.

Notary Public,
Pike County, Kentucky.

APPENDIX G.

TRANSCRIPT OF PROCEEDING AT HEARING ON MOTION FOR NEW TRIAL, SEPTEMBER 6, 1966.

Case No. 706, styled Bertha Duty v. George W. Dotson, was called for hearing on the defendant's motion for a new trial in the United States District Court for the Eastern District of Kentucky, at Pikeville, on September 6, 1966, before His Honor, Bernard T. Moynahan, Jr., Judge of said Court.

The Court: All right, Gentlemen. Judge Auxier, are you ready to proceed?

Judge Auxier: Yes.

The Court: Are you ready, Mr. Page?

Mr. Page: May it please Your Honor, Mrs. Duty is present as directed by the Court. In this case the defendant has filed a motion and grounds for a new trial supported by an affidavit as to employment by her in '64 and 1965. I understand in talking with her that the contents of the affidavit are true, or substantially true. I have not controverted them as a matter of record. In checking the trial transcript there was no reference to the specific employments in question but, as I read the transcript, there are general questions that would have called for an answer as to these employments. Now I have talked with her this morning about this. As Your Honor may recall, when we had the last trial, and perhaps the one previously, Mrs. Duty has had some difficulty in hearing. The only explanation that I can offer, and the Court may want to question her, is that due to her impediment she could possibly have misunderstood. I do not think there was any intent to mislead, even though from the record that did happen.

The Court: Well, let me ask you this, Mr. Page—do you concede that the defendant's motion is well taken?

Mr. Page: Well, I concede that the statements of fact as alleged in the affidavit are true. That is the best information that I can give, and it is my duty to present the facts correctly to the best of my ability to the Court. Even at the previous hearing I never denied them once I had a chance to check them.

The Court: All right, what do you have to say, Judge Auxier?

Judge Auxier: If Your Honor please, when we had the previous hearing on this matter in July, at that time Mr. Page had not done any investigation on the question and he asked for time to file affidavits. The order gave fifteen days to the plaintiff to produce any affidavits and, as Mr. Page says, none were presented. As the matter now stands we are willing that the matter be submitted on the record.

The Court: All right, Gentlemen, I will have to read what's in this matter. If that's agreeable, just let it be passed and submitted on the record. Is that agreeable, Mr. Page?

Mr. Page: That is agreeable.

The Court: It disturbs the Court somewhat, Gentlemen. This case has been tried twice. Of course wo can't help that. It has just developed that there are these inconsistencies in it. All right, the Court will take it under submission. Call the next case, please. You gentlemen don't need Mrs. Duty any further, do you, Judge Auxier?

Judg Auxier: We have no desire—the only reason we requested her presence was because we thought there might be affidavits controverting—

The Court: All right.

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